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Supreme Court of the United States

OCTOBER TERM, 1994

CAPITOL SQUARE REVIEW AND ADVISORY BOARD, RONALD T. KELLER, DANIEL SHELLENBARGER AND OHIO SENATOR RICHARD T. FINAN,

Petitioners,

v.

VINCENT J. PINETTE, DONNIE A. CARR, AND KNIGHTS OF THE KU KLUX KLAN,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF AMICI CURIAE OF COUNCIL ON RELIGIOUS FREEDOM, AMERICANS FOR RELIGIOUS LIBERTY, AND THE AMERICAN HUMANIST ASSOCIATION IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*

Council on Religious Freedom ("CRF"), a national, nonprofit organization, exits to uphold and promote the constitutionally protected right of religious liberty. Its Board of Directors is composed of individuals active in religious affairs. For almost a decade, CRF has been an advocate of these principles in state and federal courts throughout the country.

CRF files this friend of the court brief because the lower courts' interpretation of the First Amendment permits the Free Speech Clause to devour the Establishment Clause, emptying it of any independent meaning whenever religious activity takes the form of speech in a public forum.

Americans for Religious Liberty ("ARL") is a national, nonprofit public interest educational organization dedicated to defending religious liberty and the constitutional principle of separation of church and state. ARL has been a friend of the court in numerous briefs filed in the United States Supreme Court.

The American Humanist Association ("AHA") is a national educational and philosophical organization founded in 1941. The AHA and its members strongly support the constitutional principle of separation of church and state. The AHA has appeared as a friend of the court in a number of Supreme Court cases.

The parties consented to the filing of this brief in letters of consent submitted to the Clerk of this Court.

SUMMARY OF ARGUMENT

First, the Sixth Circuit's authorization of a religious symbol -- a Latin cross -- on the Ohio State House grounds based upon the First Amendment's Free Speech Clause ignored legitimate Establishment Clause concerns. In so doing, the court allowed the Free Speech Clause to "trump" the Establishment Clause.

Because a site happens to be a public forum, here the center of Ohio State government, does not automatically give the Free Speech Clause final control. Under such circumstances, a compelling state interest analysis must be applied to satisfy the state's legitimate concern that the requirements of the Establishment Clause be satisfied.

A court must look at the nature, size, location, duration, and the religious symbol's relationship to the symbolic center of government. In this context, a Latin cross on the Ohio State House grounds violates the Establishment Clause jurisprudence of this Court. The effect of the Sixth Circuit's decision is to permit the appearance of government endorsement of religion.

Second, the Fourteenth Amendment's Equal Protection Clause does not condone prior violations of the Establishment Clause. Nor do prior violations condone future violations. The remedy is to take corrective action preventing future violations.

ARGUMENT

I. THE COURTS BELOW IMPROPERLY IMPOSED A PER SE RULE THAT THE DISPLAY OF A RELIGIOUS SYMBOL BY A PRIVATE ORGANIZATION IN A PUBLIC FORUM NEVER VIOLATES THE ESTABLISHMENT CLAUSE.

Relying on the Sixth Circuit's decision in *Americans United for Separation of Church and State v. City of Grand Rapids*, 980 F.2d 1538 (6th Cir. 1992) (en banc), the district court concluded the erection of a large unattended Latin cross upon the Ohio Capitol Square during Christmas did not constitute a government endorsement of religion. *Pinette v. Capitol Square Review and Advisory Bd.*, 884 F. Supp. 1182, 1185 (S.D. Ohio 1993). This was premised on the court's understanding of the Sixth Circuit's holding "that where an equal access policy exists, religious speech must be afforded the same privileges as nonreligious speech, the Establishment Clause notwithstanding." *Id.* at 1187. The district court held because "[t]he instant request comes from a private party to erect a religious symbol in what is a traditional public forum," it was unable "to conclude that permitting this display would constitute government endorsement of religion." *Id.*

On appeal, the Sixth Circuit announced "a private organization's unattended display of a religious symbol in a public forum" does not violate the Establishment Clause "provided that there is equal access to the public forum and the display itself is truly private." *Pinette v. Capitol Square Review and Advisory Bd.*, 30 F.3d 675, 676, 679 (6th Cir.

1994).[1] However, the Sixth Circuit did acknowledge where there is a compelling governmental interest, speech in a public forum may be restricted. Regardless, the court concluded "[r]eligious groups may not be selectively denied access to public forums in the name of the Establishment Clause." *Id.* at 680. The court further held "the most fervently devotional and blatantly sectarian speech is protected when it is private speech in a public forum." *Id.*

Such a conclusion runs counter to this Court's prior analyses in similar cases. As Justice O'Connor noted in *County of Allegheny v. ACLU*, 492 U.S. 573, 623 (1989) (O'Connor, J., concurring in part and concurring in the

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[1]Unlike the circuit panel in the instant case, the Sixth Circuit sitting en banc in *Americans United*, 980 F.2d 1538 seemed less inclined to embrace a per se rule observing that Justice O'Connor in *Lynch* had warned the practice must be judged in its unique circumstances and depends on the circumstances and context of a particular practice. *Id.* at 1544. *Americans United* required the Court consider all the facts in each case, *id.* at 1551, but nevertheless held: "truly private religious expression in a truly public forum cannot be seen as an endorsement by a reasonable observer." *Id.* at 1553. Although the court stated "[t]his holding does not mean that an equal access policy in a public forum 'trumps' the Establishment Clause," *id.* at 1553, the court concluded if "the evidence indicates that an area actually is a traditional public forum, then private groups may express a religious message without a reasonable observer inferring public support of the message." *Id.* This led Judge Lively to conclude "[t]he majority would require the Establishment Clause always to yield to, or accommodate the Free Speech Clause as exemplified by the public forum doctrine." *Id.* at 1558 (Lively, J., dissenting).

judgment):

> The *Lynch* Court began its analysis by stating that Establishment Clause cases call for careful line-drawing: "[N]o fixed, *per se* rule can be framed." *Id.*, at 678.

This Court in *Carey v. Brown*, 447 U.S. 455, 461-62 (1980), announced:

> When government regulation discriminates among speech-related activities in a public forum, the Equal Protection Clause mandates that the legislation be finely tailored to serve substantial state interests, and the justifications offered for any distinctions it draws must be carefully scrutinized.

In *Burson v. Freeman*, 112 S. Ct. 1846, 1859 (1992), Justice Kennedy observed "there is a narrow area in which the First Amendment permits freedom of expression to yield to the extent necessary for the accommodation of another constitutional right." Thus, in *Lamb's Chapel v. Center Moriches Sch. Dist.*, 113 S. Ct. 2141, 2148 (1993), citing its earlier opinion in *Widmar v. Vincent*, 454 U.S. 263, 271 (1981), this Court found "the interest of the State in avoiding an Establishment Clause violation 'may be [a] compelling' [state interest] justifying an abridgement of free speech otherwise protected by the First Amendment." Instead of taking refuge in a per se determination, the courts must carefully analyze "both the content and the context of speech." *FCC v. Pacifica Found.*, 438 U.S. 726, 744 (1978).

The facts as they relate to the content and context of the symbolic speech here are crucial to this constitutional

analysis:

(1) In December of 1993, the Capitol Square Review and Advisory Board voted not to permit displays on the Capitol Square during December, 1993. The vote was later declared invalid and on November 23, 1993, the board voted to approve displays of a Christmas tree and a Menorah. *Pinette*, 884 F. Supp. at 1183.

(2) On November 29, 1993, Rabbi Capland applied for permission to erect a Menorah on the Capitol Square from December 8-16, 1993. *Id.*

(3) On November 29, 1993, plaintiff Carr applied on behalf of the Ku Klux Klan for a permit to display a cross on the Capitol Square from December 8-24, 1993. The application described the type of event to be to "erect a cross for Christmas." *Id.*

(4) On December 3, 1993, the board's executive director denied the Klan's requested permit on the grounds the State and Federal Constitutions forbid such activity directing the Klan's attention in particular to controlling decisions recently rendered by the U.S. Supreme Court under the First Amendment. *Id.*

(5) The state displayed its own state Christmas tree on Capitol Square for the past several years (Respondents' Opposition to Pet. at 4). *Id.* at 1184. *See also* Respondents' Opposition to Pet. for Cert. at 6.

(6) The Klan openly acknowledged their purpose in seeking to erect the Latin cross was to display "a symbol of our Lord, Jesus Christ," in furtherance of their more general purpose to "establish a Christian government in America."

(TR. of Dec. 20, 1993, Hearing at 101-02).

(7) Although acknowledging events subsequent to the oral argument appeal hearing had rendered the case moot, *Pinette*, 30 F.3d at 677, the district court nonetheless concluded there was still an actual case or controversy. The injury was of such short duration it made review largely impossible. Further, the injury was likely to recur since "the Klan or *some other organization* [would], in the future, seek access to Capitol Square." *Id.* (emphasis supplied).

Three points are critical. First, Capitol Square was used for both government and private speech. The state erected a state Christmas tree, while the Klan erected their cross. Second, the Klan's cross was not integrated as part of a seasonal display. Third, in refusing to dismiss on mootness, the courts below concluded that in the future some organization (not necessarily the Klan) might seek to erect such a religious symbol.

Since both the state and private organizations used Capitol Square for their respective purposes, the Sixth Circuit's holding that a reasonable observer would know the symbol was private is questionable.[2] The court of appeals concluded "the 'reasonable' observer -- being an individual who is knowledgeable about local events -- might well know

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[2]As Judge Cornelia Kennedy pointed out in her concurring panel opinion in *Americans United* and quoted by Judge Lively in discussing the placement of a Menorah in the public square: "We have here a public forum provided by the government in which some speech, the Calder sculpture, is in some fashion endorsed by the government, and other speech, the menorah, is not readily identifiable as not being endorsed or promulgated by that same government." 980 F.2d at 1557.

by virtue of all of the recent media coverage that the state of Ohio as represented by its leading elected officials opposes the display of the cross and any messages which might reasonably be associated with this display by the Klan." *Pinette*, 844 F. Supp. at 1187. Such an analysis is illogical because under a per se holding, any future permit requests must automatically issue for a like display.

The Sixth Circuit's argument fails because the continued controversy relates to future requests by organizations other than the Klan. A subsequent request by a mainline religious group might not be met with government resistance. At that moment the analysis will not be the reasonable observer, knowledgeable about local events in 1993; rather it will be a reasonable observer then seeing a cross at a location clearly identified with the core functions of state government.

County of Allegheny involved a creche located at the "seat of government." Justice Blackmun observed how the court of appeals, 842 F.2d 655, 662 (3d Cir. 1988), had found: "Each display was located at or in a public building devoted to core functions of government." In contrasting the creche in *County of Allegheny*, Justice O'Connor observed "the creche in *Lynch* [*v. Donnelly*, 465 U.S. 668 (1984)] . . . was displayed in a private park in the city's commercial district as part of a broader display of traditional secular symbols of the holiday season, [while] this creche stands alone in the county courthouse." *County of Allegheny*, 492 U.S. at 626 (O'Connor, J., concurring in part and concurring in the judgment).[3] She further stated:

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[3]In *County of Allegheny*, Justice Stevens was concerned about even a Christmas tree "[s]tanding alone in front of governmental headquarters." 492 U.S. at 654 (Stevens, J.,

> The display of religious symbols in public areas of core government buildings runs a special risk of "mak[ing] religion relevant, in reality or public perception, to status in the political community." *Lynch*, *supra*, at 692.

Id.

Rather than the per se analysis of the courts below, this Court must require, as the Constitution demands, careful scrutiny of "the nature, size, location, and duration of the display, and its relation to the symbolic center of government" in determining whether there exists the appearance of a government imprimatur on a religious symbol. *Smith v. County of Albermarle, Virginia*, 895 F.2d 953, 959 n.6 (4th Cir. 1990).

Absent such an analysis, the Free Speech Clause would be permitted to subsume the Establishment Clause, leaving a meaningless shell. In his scholarly dissent in *Americans United*, 980 F.2d at 1558, Judge Lively rejected the concept that the Establishment Clause must always accommodate the Free Speech Clause:

> I believe the accommodation should be the other way around, because as Justice Kennedy recognized, the Establishment Clause stands apart within the First Amendment as a specific prohibition against certain state activities, and there is no exact counterpart in the speech provisions. Thus, I believe that the public forum concept must accommodate the proscriptions of the Establishment Clause.

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concurring in part and dissenting in part).

Kaplan v. City of Burlington, 891 F.2d 1024, 1029 (2d Cir. 1989), dismissed the argument that there was "an absolute constitutional right to engage in symbolic expressive conduct in a public forum such as City Hall Park, limited only by narrow time, place and manner regulations." According to the court, "[i]f this were so . . . the public forum doctrine would swallow up the Establishment Clause . . . . The existence of a public forum is simply a factor to be taken into account in determining whether the context of the display suggests government endorsement." *Id.* The Second Circuit distinguished the placement of a religious symbol at the seat of government from the equal access decision in *Widmar v. Vincent*, 454 U.S. 263 (1981), noting that in *Widmar* the existence of a public forum began, rather than ended, the Court's analysis. *Kaplan*, 891 F.2d at 1029. Distinguishing a stand alone religious symbol from the Court's concern in *Widmar*, the Second Circuit in *Kaplan* noted:

> Central to the Court's conclusion in *Widmar* that an equal-access policy on the part of the university would not violate the Establishment Clause was the factor that "an open forum in a public university does not confer any imprimatur of state approval on religious sects or practices," any more than such a policy confers approval on such eligible groups as the "Students for a Democratic Society [or] the Young Socialist Alliance." 454 U.S. at 274. The same cannot be said of the City's permission to display an unattended, solitary religious symbol in City Hall Park, given that Park's close association with the seat of city government.

Id. at 1030.

In the instant case, once the Klan erected the Latin cross in furtherance of its general purpose to "establish a Christian government in America," a group of Christian ministers sought permission to erect 20 more Latin crosses in front of the Ohio State House. Numerous crosses were displayed including a Greek Orthodox cross. If a reasonable observer did not believe the state had endorsed the quintessential Christian religious symbol when the Klan erected the Latin cross, what was that observer to conclude with the subsequent erection of additional Latin crosses and a Greek Orthodox cross by local churches? As Justice O'Connor noted in her concurring opinion in *Lynch v. Donnelly*:

> Every government practice must be judged in its unique circumstances to determine whether it constitutes an endorsement or disapproval of religion. In making that determination, courts must keep in mind both the fundamental place held by the Establishment Clause in our constitutional scheme and the myriad, subtle ways in which Establishment Clause values can be eroded. Government practices that purport to celebrate or acknowledge events with religious significance must be subjected to careful judicial scrutiny.

Id. at 694.

Unlike the creche in *Lynch*, a myriad of Christian crosses on the Ohio State House grounds could not reasonably have been viewed as a mere part of an overall holiday setting. The cumulative impact of numerous crosses certainly

exacerbated, rather than negated, a message of endorsement.[4] For as the court in *ACLU of Mississippi v. Mississippi State General Serv. Admin.*, 652 F. Supp. 380, 384 (S.D. Miss. 1987), found "[t]he cross is a sectarian symbol with no secular

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[4]Numerous cases have suggested the cross is not a traditional Christmas symbol. In *ACLU of Illinois v. City of St. Charles*, 622 F. Supp. 1542, 1545 (N.D. Ill. 1985), the court noted that "unlike the creche, a cross on a building, even during the Christmas season, does not ordinarily conjure up in a viewer's mind the historical antecedents of the Christmas holiday. Indeed, many Christian church buildings display the latin cross to indicate that the building is in fact a church. For this reason, among others, a cross on a building has come to have religious meaning in our society separate from any religious holiday." That court also concluded "unlike a creche, a cross is not commonly found displayed in the midst of purely secular symbols of the Christmas holiday. And unlike a creche which is traditionally displayed only at Christmas time, a cross is displayed year-round on buildings associated with the Christian religion (e.g., churches and parochial schools) for the purpose of conveying the message that the building is associated with the Christian religion." *Id.* at 1546. In *Mendelson v. City of St. Cloud*, 719 F. Supp. 1065, 1069 (M.D. Fla. 1989), that court noted "[t]he Latin cross is unmistakably a universal symbol of Christianity. . . Such a cross has always been a symbol of Christianity, and it has never had any secular purpose." In *Greater Houston Chapter of the ACLU v. Echels*, 589 F. Supp. 222, 234-35 (S.D. Tex. 1984), the court stated "that the cross and the Star of David are the primary symbols for Christianity and Judaism respectively is beyond question. . . . The messages conveyed by these symbols are not lost when they are removed from the churches and synagogues with which they are traditionally associated."

significance." And in *Doe v. Small*, 964 F.2d 611, 613 (7th Cir. 1992) (en banc), the court recognized that a religious symbol should not be placed at the seat of government.

Two other circuits have rejected the per se analysis followed by the Sixth Circuit in this case and reasoning contained in *Americans United for Separation of Church & State v. Grand Rapids*, 980 F.2d 1538 (6th Cir. 1993) (en banc). *See Kaplan v. City of Burlington*, 891 F.2d 1024 (2d Cir. 1989), *cert. denied*, 496 U.S. 926 (1990); *Chabad-Lubavitch of Vermont v. City of Burlington*, 936 F.2d 109 (2d Cir. 1991), *cert. denied*, 112 S. Ct. 3026 (1992); and *Smith v. Albermarle County*, 895 F.2d 953 (4th Cir.), *cert. denied*, 111 S. Ct. 74 (1990).

Further, the adoption of the per se rule adhered to below has been rejected by other courts. For instance, the reasoning of *McCreary v. Stone*, 575 F. Supp. 1112 (S.D. N.Y. 1983), is compelling although later overturned by the Second Circuit. 739 F.2d 716 (2d Cir. 1984). *McCreary* involved a private organization claiming denial of free speech and free exercise rights when refused access to a village-owned park to display a privately owned nativity scene. The village in *McCreary*, like petitioners here, "argu[ed] the denial was necessary to serve a compelling state interest because to allow the erection of the creche on public property would violate the Establishment Clause of the First Amendment. . . ." *McCreary*, 575 F. Supp. at 1126.

The district judge rejected any reliance on *Widmar*, distinguishing *Widmar*: "[R]eligious speech was to take place at 'group[] meeting[s]' and consist of 'discourse' by 'speakers,' and 2) the forum in which the speech would occur would be university facilities, presumably classrooms and meeting rooms. . . ." *Id.* at 1128 (citation omitted).

However, in discussing the erection of a stand-alone creche, the court observed:

> In contrast, the instant case involves 1) religious speech in the form of a physical structure which for ten to fourteen days is to convey its adherents' message, twenty-four hours a day, even in their absence, and 2) is to do so in a public park visited by persons "of all stripes," clearly including children.

Id. at 1128. In finding such a creche in a public park had the primary effect of advancing religion, the trial court turned to prior decisions of this Court which "'recognize that government sponsorship of religious beliefs can occur in ways far more subtle than endowing state churches or mandating acceptance of certain religious rites or tenets.'" *Id.* at 1130 (citation omitted). In *McCreary* "'the mere *appearance* of a joint exercise of . . . authority by Church and State provides a significant symbolic benefit to religion' and therefore may impermissibly advance religion." *Id.* (citation omitted).

Of interest to this case was *McCreary's* analysis of *Widmar*:

> First, in contrast to cases like *Widmar* where speech derives from the simultaneous efforts and actions of those who have gathered to engage in it, when a symbol is placed on public land the land performs an added and enhanced *function*. No longer is the land just a place from which a message can be proclaimed; when a symbol is left on public land the land actually becomes the message bearer. This means that public resources are substituted for

> personal conduct as a way of generating the speech. . . .
>
> The second way in which permitting the creche for ten days would advance religion is closely related. Because when a symbol is implanted on public land that land uniquely becomes the message bearer, and because, concomitantly, there are no persons present to whom the receiver of the religious message can attribute the speech, the possibility that those receiving the message will assume it is supported by the state is particularly present.

Id. at 1130-31 (emphasis in original).[5]

Judge Boyce F. Martin, Jr., in his dissent in *Americans United*, 980 F.2d at 1555, observed "[t]he First Amendment protects [a religious organization's] right to say anything it

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[5]The district court in *McCreary* rejected the idea that the placement of a sign next to the religious symbol could cure the constitutional infirmity, stating "[t]he advancement problems are not cured by the placement of a sign next to the creche. First, a sign does not solve the problem of public land taking over the function of message bearer from adherents. Second, it is doubtful that a sign saying that a symbol has been 'erected and maintained' by a private group will entirely eliminate the appearance of state support when public land is still the one visible thing to which the speech may be attributed." 575 F. Supp. 1132-33. In the instant case the location of a sign adjacent to a single cross or a row of twenty crosses will go unnoticed during wintery days and nights in Ohio's capital city frequented not only by residents but visitors unfamiliar with local community squabbles.

wants to say [in a public forum], but the First Amendment does not mandate allowing [a religious organization] to leave a religious symbol, which creates the appearance of government-endorsed religion, on the [public] square." In discussing the relevance of the equal access statute validated in *Board of Educ. v. Mergens*, 496 U.S. 226 (1990), also in dissent, Judge Lively observed "[i]f the sponsoring group of the religious discussions in *Mergens* had erected and left unattended for a period of time a large religious sign in front of the school, or in a classroom, I believe *Lynch* and *Allegheny County* would require a different result." *Americans United*, 980 F.2d at 1560 (Lively, J., dissenting).

Justice O'Connor shares these concerns. In *County of Allegheny*, she suggests there is a "need to focus on the specific practice in question in its particular physical setting and context in determining whether government has conveyed or attempted to convey a message that religion or a particular religious belief is favored or preferred." *Id.* at 637.[6]

Regardless of the government's purpose here, a significant portion of the potentially large audience observing the Latin cross on the State House grounds will conclude the state is endorsing religion in general and Christianity in particular. *See Lynch v. Donnelly*, 465 U.S. at 690 (O'Connor, J., concurring). As Justice O'Connor noted, "the endorsement standard recognizes that the religious liberty so

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[6]In *County of Allegheny* Justice Stevens believed: "the Establishment Clause should be construed to create a strong presumption against the display of religious symbols on public property. There is always a risk that such symbols will offend nonmembers of the faith being advertised as well as adherents who consider the particular advertisement disrespectful." *Id.* at 650-51.

precious to citizens who make up our diverse country is protected, not impeded, when government avoids endorsing religion or favoring particular beliefs over others. *County of Allegheny*, 492 U.S. at 631 (O'Connor, J., concurring in part and concurring in the judgment).

Ohio's decision on whether to permit the placement of a stand alone Latin cross at the seat of state government should be deemed to implicate compelling state interests related to the First Amendment's Establishment Clause. Of course, any exclusion must be narrowly tailored. As Justice O'Connor noted in *County of Allegheny*: "Clearly the government can *acknowledge* the role of religion in our society in numerous ways that do not amount to an endorsement." *Id.* "[A] prohibition limited to displays of unattended, solitary religious symbols on public property would be narrowly tailored to serve . . . [the constitutional mandate of the Establishment Clause] since it would allow the continued use of . . . [the seat of government] for all other uses." *Kaplan v. City of Burlington*, 891 F.2d 1024, 1030 (2d Cir. 1989).

The Supreme Court in *Lynch* and *County of Allegheny* permitted recognition of the role of religion in our society without adopting a per se rule validating the exclusive placement of Christianity's universal symbol. However, in the event the majority of this Court concludes a nongovernmental organization or individual should, under the Free Speech Clause, be entitled to retain an undiluted religious display on public property, one alternative would be to require the placement of such religious items on property not as clearly associated with state government as the State Capitol building. Arguably, such an option would allow ample alternative channels of communication.

II. THE EQUAL PROTECTION CLAUSE DOES NOT MANDATE CONTINUED VIOLATIONS OF THE ESTABLISHMENT CLAUSE.

The Fourteenth Amendment's Equal Protection Clause does not require this Court to permit the continued violation of no-establishment principles. Even if prior Establishment Clause violations have occurred, the remedy is not to expand the scope of constitutional violation but to eliminate it as to all groups. As Justice O'Connor noted in *County in Allegheny*:

> Historical acceptance of a practice does not in itself validate that practice under the Establishment Clause if the practice violates the values protected by that Clause, just as historical acceptance of racial or gender based discrimination does not immunize such practices from scrutiny under the Fourteenth Amendment. As we recognized in *Walz v. Tax Comm'n of New York City*, 397 U.S. 664, 678 (1970): "[N]o one acquires a vested or protected right in violation of the Constitution by long use, even when that span of time covers our entire national existence and indeed predates it."

492 U.S. at 630.

In December of 1993 when the controversy existed between Ohio's Capitol Square Review and Advisory Board and the Ku Klux Klan, citizens of Ohio may not have felt threatened by the erection of a single Latin cross. However, the placement of additional crosses by local churches presents a significant new development. Nevertheless, "if [a Klan cross] is allowed, it would also seem permissible to display,

standing alone, a symbol [placed there through the efforts of a majority faith which] . . . could well lead members of minority religions or nonbelievers to think that '"adherence to a religion"' was relevant to '"standing in the political community."'" *Kaplan v. City of Burlington*, 891 F.2d at 1030 (citations omitted).

As the Sixth Circuit correctly noted in *ACLU v. City of Birmingham*, 791 F.2d 1561, 1566 (6th Cir. 1986):

> Since the majority does not need its protections, the Bill of Rights was adopted for the benefit and protection of minorities. From the beginning, Christians have constituted a majority in America and non-Christians are acutely aware of this fact. Their assurance of equality before the law, despite their religious nonconformance, derives from the guarantees of the First Amendment.

Paraphrasing the Sixth Circuit in *City of Birmingham*, a non-Christian would believe a display of a lone Latin cross near a State Capitol entrance, whether provided or financed by a nongovernmental party, meant the state was endorsing Christianity. A symbol thus displayed

> sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.

Lynch v. Donnelly, 465 U.S. at 688 (O'Connor, J., concurring).

As Judge Lively answered the majority in *Americans United*, 980 F.2d at 1564:

> To accept the majority's construction of the interplay between Establishment Clause principles and the public forum doctrine would turn the Establishment Clause into a paper screen rather than the bulwark of separation between church and state it was intended to be.

CONCLUSION

For these reasons, the judgment of the United States Court of Appeals for the Sixth Circuit must be reversed.

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Respectfully submitted,

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